STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 3, 2006
v	No. 267976 Sanilac Circuit Court
THOMAS JAMES EARLS, Defendant-Appellee.	LC No. 05-006016-FC

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order granting defendant's motion to suppress evidence derived from investigative subpoenas issued in violation of MCL 767A.1 et seq. We affirm.

We are faced with an issue that has not been directly addressed in our courts, and we decline to set a precedent that enables state and local officials to go on fishing expeditions into the records of any private citizen at any time with no criminal case pending and no proper authorization from a judge. In this case, the prosecutor freely admitted during oral argument that while she recognized her office had made a mistake in obtaining the subpoenas at issue, in fact her office routinely followed a process that entirely circumvented the process required by statute for acquiring investigative subpoenas. We find that to curtail this abuse of process, we cannot allow the prosecutor to use the evidence thereby obtained without penalty. Failure to exclude such evidence would be dangerous ground for a culture that values the right to privacy and that bills itself as a society of laws.

The facts here are simple. A safe containing a large sum of cash was stolen from a residence/office[1]. The police determined from the caller-ID screen at the residence that a call had been made from a gas station pay phone, and assumed this was done by the person or persons who stole the safe to be certain the residence was empty. The police determined from a security video with a view of the pay phone that defendant and his alleged accomplice were at

[1] The building included an office in which the owner kept a safe, and a residence that the owner rented to a tenant.

the gas station at about the time the call was made. With no case then pending against defendant, the prosecutor filled out and sent out at least 17 alleged subpoenas seeking defendant's bank records, business records, the phone records for the pay phone, and business and bank records pertaining to defendant's wife.

The subpoenas were each on State Court Administrative Office forms, with the box indicating the charge filled out as "PENDING CRIMINAL INVESTIGATION." The spaces for plaintiff and defendant were left blank. Each form stated in bold print near the signature line that "FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT." Three forms were signed by the prosecuting attorney, one by an assistant prosecutor, and 13 by Judge James A. Marcus of the Sandusky District Court.

The trial court suppressed evidence derived from the subpoenas based on its determination that they were issued in violation of MCL 767A.1 et seq. The prosecutor appealed this decision.

"This Court reviews a trial court's ruling regarding a motion to suppress for clear error. However, questions of law relevant to the suppression issue are reviewed de novo." *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001). Issues of statutory interpretation are also reviewed de novo. *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005). Whether a party has standing is also a question of law reviewed de novo. *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 177; 702 NW2d 588, lv gtd 474 Mich 986 (2005).

Because no case was pending against defendant when the subpoenas were issued, the investigative subpoena statute, MCL 767A.1 et seq, applies. MCL 767A.2 authorizes a prosecutor to petition a court "in writing for authorization to issue 1 or more subpoenas to investigate the commission of a felony." The petition "shall contain all of the following:

> (a) A brief description of each felony being investigated.
>
> (b) The name of each person who will be questioned or who will be required to produce material described under subdivision (c).
>
> (c) A general description of any records, documents, or physical evidence to be examined.
>
> (d) A brief statement of the facts establishing the basis for the prosecuting attorney's belief that the testimony of the person or examination of the records, documents, or physical evidence is relevant to the investigation of a felony described in the petition.

MCL 767A.3 authorizes a judge to "authorize a prosecuting attorney in writing to issue 1 or more investigative subpoenas under this chapter if all of the following circumstances exist:

(a) A petition is properly filed under section 2.

(b) The judge determines there is reasonable cause to believe a felony has been committed.

(c) The judge determines there is reasonable cause to believe that either of the following circumstances exists:

(i) The person who is the subject of the investigative subpoena may have knowledge regarding the commission of the felony.

(ii) The records, documents, or physical evidence are relevant to investigate the commission of a felony described in the petition.

MCL 767A.4(1)(f) provides that the subpoena must include "[a] statement that the person may object to the investigative subpoena or file reasons for not complying with the investigative subpoena by filing a written statement of objection or noncompliance with the prosecuting attorney on or before the date scheduled for the questioning or the production of the records, documents, or physical evidence." MCL 767A.4(1)(g) adds that recipients have the right to have counsel present during any questioning or when producing records. As the trial court correctly noted, the recipients of the subpoenas at issue here not only were not informed they could object to complying, they were led to believe quite the opposite was the case since the form included the statement: "FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT."

The trial court found that "[t]here is no question that these purported subpoenas do not remotely meet the conditions required by this statute." We agree.

We note that the requirements that subpoena recipients be advised of their right to counsel and their right to object to compliance suggest that the statute is designed to protect the rights of subpoena recipients, the banks, phone companies, and other keepers of records who may not wish to turn their records over to police or prosecutors without assurance that they are protected under the law. However, we also find that the statute includes protection for persons situated as defendant here is, persons whose privacy has been invaded without benefit of a judicial determination that there is reasonable cause for the prosecutor to obtain and act on investigative subpoenas. MCL 767A.3(c) requires a judge to find "reasonable cause" to investigate, thereby protecting the rights of those not yet accused.

Given that finding, the dispositive issue here then is whether the trial court erred by applying the exclusionary rule as a sanction for violation of MCL 767A.1 et seq.[2]

[2] Defendant alleges a constitutional violation as well in this unreasonable search and seizure. We are bound, however, by *Eyde v Eyde*, 172 Mich App 49, 56; 431 NW2d 459 (1988), which relied on *United States v Miller*, 425 US 435; 96 S Ct 1619; 48 L Ed 2d 71 (1976) in finding that "[t]here is no legitimate expectation of privacy in such bank records which would give plaintiff standing to challenge the subpoena issued to the bank." Absent a reasonable expectation of privacy, defendant has no valid constitutional claim. Defendant argues that *Miller* and therefore

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Our Supreme Court has found that "the drastic remedy of exclusion of evidence does not necessarily apply to a *statutory* violation." *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003). (emphasis in original). We find that in a case such as this, where the statute at issue is so essential to protect the rights of private citizens against invasions of privacy by state and local authorities, the remedy for the prosecutor's complete and total disregard for the dictates of the statute does merit the drastic remedy of exclusion. We find, in fact, that this is a necessary outcome to prevent the carte blanche accessibility of banking and other private records of citizens where there is no reasonable cause to investigate. Prosecutors are not precluded from accessing such information in the course of a legitimate investigation, they are merely held to the standard set in the statute: they must demonstrate, to a judge, the need to invade a person's privacy where they have not yet filed any charges.

We find that while exclusion may be a drastic remedy, the complete disregard for the requirements of this statute is also a drastic incursion into defendant's rights and a like violation of legal process. The trial court did not err by suppressing the evidence at issue.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

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Eyde are superseded by the Federal Right to Financial Privacy Act (RFPA), 12 USC 3402. However the RFPA applies by its terms only to federal agencies, and it is therefore inapplicable here, where local officials overstepped their authority.